

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN P. MOYNA

Appeal No. 2002-0894
Application No. 09/283,650

HEARD: Jan. 21, 2003

Before STAAB, MCQUADE, and NASE, Administrative Patent Judges.
STAAB, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 21-26, 28-31 and 33-40, all the claims pending in the application.

Appellant's invention pertains to an ejector device for ejecting load material (claims 21, 22, 28-31 and 33-36), a method

Appeal No. 2002-0894
Application No. 09/283,650

of ejecting load material (claims 23, 24 and 40), and a ground-driven mobile work machine having an device for ejecting load material (claims 25, 26 and 37-39). An understanding of the invention can be derived from a reading of exemplary claim 21, reproduced below (with emphasis added):

21. A load-carrying body for use with a mobile work machine, comprising:

first and second opposed side walls;

a floor joining said side walls;

a movable ejector interposed between said side walls and having a lower margin adjacent said floor and an upper margin, said side walls, said floor, and said ejector together defining a load cavity open at an end thereof;

an ejector actuator connected with said ejector for moving said ejector toward said open end to eject load material from said cavity through said open end, *movement of said ejector against said load material causing said ejector to tilt at its upper margin toward said open end to press the lower margin of said ejector against the floor of said body.*

The single reference relied upon by the examiner in the final rejection is:

Neyland	2,996,202	Aug. 15, 1961
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Claims 21-26, 28-31 and 33-40 stand rejected under 35 U.S.C. § 112, second paragraph, "as being indefinite for failing to particularly point out and distinctly claim the subject matter

Appeal No. 2002-0894
Application No. 09/283,650

which applicant regards as the invention" (answer, page 3).

Claims 21-26, 28-31 and 33-40 stand further rejected under 35 U.S.C. § 103(a) as being unpatentable over Neyland.

Reference is made to appellant's main and reply briefs (Paper Nos. 12 and 15) and to the final rejection and examiner's answer (Paper Nos. 8 and 13) for the respective positions of appellant and the examiner regarding the merits of these rejections.

The 35 U.S.C. § 112, second paragraph, rejection

We will not sustain the standing rejection of the appealed claims under 35 U.S.C. § 112, second paragraph.

The examiner's rationale for this rejection is set forth on page 3 of the answer as follows:

. . . it is not understood how the ejector's degree of tilting is regulated because no means (guides, etc.) to mount the ejector have been set forth; also, in line with the above, it is not understood how the a mount [sic, amount] of tilting is controlled in order that the ejector not gauge the floor and stall the ejector. Further, it is not understood how the connection between the actuator and ejector is made - in other words, is the connection a pivot, a weld or what? Lastly, it is not understood if the ejector attachment to the actuator is made at the ejector's height mid-point, at a point higher than a midpoint, etc. in order to achieve the tilting.

The second paragraph of 35 U.S.C. § 112 requires claims to set out and circumscribe a particular area with a reasonable degree of precision and particularity. *In re Johnson*, 558 F.2d 1008, 1015, 194 USPQ 187, 193 (CCPA 1977). In making this determination, the definiteness of the language employed in the claims must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art. *Id.* Moreover, in setting forth the claimed subject matter, there is nothing intrinsically wrong with defining something in a claim by what it does rather than by what it is. *In re Hallman*, 655 F.2d 212, 215, 210 USPQ 609, 611 (CCPA 1981); *In re Swinehart*, 439 F.2d 210, 213, 169 USPQ 226, 228 (CCPA 1971).

The examiner's reasons for calling into question the appealed claims' compliance with the second paragraph of 35 U.S.C. § 112, namely, that the claims do not set forth the particulars of the guides for regulating the tilting of the ejector, or how the ejector is connected to the actuator, or the attachment point of the actuator relative to the ejector's

Appeal No. 2002-0894
Application No. 09/283,650

height, do not indicate that the claims are indefinite in scope, but only that they are broad. However, this is not a proper basis for rejecting claims under § 112, second paragraph, because the breadth of a claim is not to be equated with indefiniteness. *In re Miller*, 441 F.2d 689, 693, 169 USPQ 597, 600 (CCPA 1971).
The 35 U.S.C. § 103(a) rejection

We likewise will not sustain the rejection of the appealed claims under 35 U.S.C. § 103(a).

In rejecting the appealed claims as being unpatentable over Neyland, the examiner makes findings with respect to the load material ejector system of Neyland and then concludes that:

As a result of the downward direction vector created by the extension of the hydraulic cylinder [60] at point 61 on the ejector and the manufacturing clearances created by the rollers [40, 41] in the guides [33, 34], the fulcrum created by the lower rollers on the ejector [42] and the greater compaction of the material near the floor of the body, it is obvious that the ejector is tilted forwardly in the direction of its movement in the claimed manner. [Answer, pages 3-4, reference numerals added.]

At the outset, we observe that the examiner has not specifically pointed out any *difference* between Neyland and the claimed subject matter. In this regard, the examiner's use of the word "obvious" in the explanation *supra* of the rejection

appears to reflect the examiner's view that the plate 42 of Neyland will inherently function in the manner called for in the claims, i.e., to tilt forwardly "in the claimed manner" as it moves to eject load material. It is our opinion, however, that the examiner's position lacks any reasonable support in the Neyland reference and is based on speculation and conjecture.

In the first place, the independent claims on appeal here, namely claims 21, 23 and 25, do not merely call for the ejector to tilt at its upper margin toward the open end of the load cavity as it ejects load material, but also that said tilting action results in the ejector moving "to press the lower margin of said ejector against the floor of said body" (claims 21, last line).¹ While it is certainly possible that the plate 42 of Neyland might tilt forwardly as it moves to eject load material from the compartment, we note that it is much more problematic that any such tilting will result in the lower margin of the plate being pressed against the floor of the compartment, as also required by the claims. This is particularly so in that

¹Independent claims 23 and 25 contain similar language.

Neyland's plate 42 is dimensioned to maintain a clearance, clearly shown in Figure 6, with the inner diameter of the body 15 of the compartment as the plate move along the compartment (column 4, lines 51-55), and in that the compartment floor is fitted with wear members 16 and 17 that cooperate with the wheels 47, 48 on the lower margins of the plate 42 to maintain this clearance throughout the plate's movement.

It is well settled that inherency may not be established by probabilities and possibilities, but must instead be "the natural result flowing from the operation as taught." See *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981). In the present case, the disclosure of Neyland does not provide an adequate factual basis to establish that the natural result flowing from following the teachings of that reference would be an ejector blade that tilts at its upper margins toward the open end of the compartment *to press the lower margin of the blade against the floor of the compartment* as load material is ejected, as claimed by appellants.

It follows from the above that the rejection of the appealed claims as being unpatentable over Neyland cannot be sustained.

Appeal No. 2002-0894
Application No. 09/283,650

Summary

The rejections of the appealed claims under 35 U.S.C. § 112, second paragraph, and 35 U.S.C. § 103(a) are reversed.

The decision of the examiner finally rejecting the appealed claims is reversed.

REVERSED

LAWRENCE J. STAAB)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN P. MCQUADE)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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JEFFREY V. NASE)	
Administrative Patent Judge)	

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Appeal No. 2002-0894
Application No. 09/283,650

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